

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

ORIGINAL

76-1335

**United States Court of Appeals
For the Second Circuit**

B
PJS

UNITED STATES OF AMERICA,

Appellee,

-against-

HENRY BUCCI,

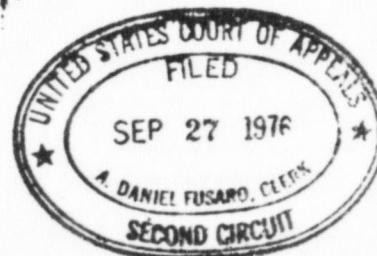
Defendant-Appellant.

*On Appeal From The United States District Court
For The Southern District of New York*

Appellant's Brief

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

HENRY BUCCI,

Defendant-Appellant

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered June 17, 1976 in the United States District Court for the Southern District of New York (Carter, J.) convicting appellant BUCCI after trial of a violation of Title 18 U.S.C. 1955 and 2 (the anti-racketeering statute, participation in gambling operations) and sentencing him to probation for a period of two (2) years.

QUESTIONS PRESENTED:

1. Did the dismissal of the conspiracy count after the government's case make imperative a declaration of a mistrial where the greatest portion of evidence admitted at trial had nothing to do with appellant - its prejudicial effects spilling over into the deliberation of appellant's guilt or innocence on the substantive counts?

2. Was appellant deprived of a fair trial when the Court in the presence of the jury recalled a witness and had that witness arrested after he refused to answer questions; when that witness had already claimed a 5th Amendment privilege before the jury earlier in the proceedings?

THE FACTS:

On October 9, 1970 a search warrant was executed at apartment 36 of 82 Given Street, Yonkers, New York by Joseph De Sciorio, a criminal investigator employed by the District Attorney's office of Westchester County (339, 340)*. Present on the premises was Michael Yannecelle seated near a table. Gambling paraphernalia was found in the drawers of the table, on top of the table and on Mr. Yannecelle's person. Two adding machines were also seized. (341-343).

Another search warrant was executed on December 27, 1974 at Gun Hill Road and Boston Road in the Bronx by Robert C. Reuter, a special agent of the FBI (347-349). Gambling records were seized from the passenger side of an automobile driven by a Michael Picciano (350-353).

More gambling records were seized when police officer James Trotta of the Yonkers Police Department fortuitously encountered John Monaco driving without a license in an automobile with a cracked windshield on September 3, 1974 (354-357). When Mr. Monaco could only produce a registration for the automobile, Officer Trotta impounded the auto. While driving it to

*() Refers to pages of the record.

the automobile pond envelopes containing gambling records fell from the sun visor of the automobile. A search after arresting Mr. Monaco revealed more gambling records (357, 358).

A third seizure pursuant to a search warrant occurred on September 2, 1975 at Park Avenue at Ashburg Avenue in Yonkers (360, 361). Criminal investigator Skelton of the Westchester County Sheriff's Office searched Albert Peduto and his vehicle and uncovered more gambling records on the person of Mr. Peduto and in the sun visor of the vehicle (362). Officer Skelton also participated in the executed of a search warrant for two "John Does" (described in warrant) uncovering more gambling records (364-367).

Michael Calise then testified to his involvement in Michael Yannecille's gambling operation. Mr. Calise related how he had succeeded his deceased father in running numbers (371). He first worked for his uncle when his uncle objected to his gambling with betting money, he switched over to Mr. Yannecelle (375-380). Mr. Calise first met Mr. Yannecelle in September or October of 1968 through Larry Centrone, who requested that Mr. Calise not run numbers from Bruno's restaurant where the police were remunerated for foregoing arrests of Mr. Centrone's runners. Mr. Centrone expressed concern that Mr. Calise would interfere with his arrangement with the police authorities (378). This arrangement was again discussed prior to Calise leaving his uncle to come under the protection of Mr. Yannecelle (379, 380).

Calise received the code number when he joined Mr. Yannecelle. He would continue to collect numbers from his former clients. This time he dropped them with one of Yannecelle's runners (381, 382). The "action" was left at Jimmy Conte's Social Club on Elm Street in Yonkers and the horse bets were phoned into telephone numbers given him by Mr. Yannecelle (383). Each Monday Calise would settle accounts with Yannecelle (386).

This arrangement continued for four (4) months until Calise approached Centrone to get him a salary job picking up numbers for Mr. Yannecelle (387, 388). Centrone obliged, however a job was not forthcoming. Calise spoke to Centrone a month later. Centrone then suggested that Calise could work for Mr. Adams (389, 390). A meeting was arranged and Calise began picking up numbers and calling in horse bets for Mr. Adams (391, 392). Calise picked up "action" in envelopes six (6) days a week (392). There were separate envelopes for horse bets and for numbers. A person named Alex got the horse bets and Adams the numbers (393). Each client had a code number and Calise picked up bets and numbers from various number runners (394).

Calise's employment with Mr. Adams lasted six or seven months until Adams retired (395). Thereafter was employed by Yannecelle (396). Yannecelle kept Calise on the same route for the first weeks then altered routes to avoid detection by the authorities (397). This employment lasted eight to ten months until August of 1971 (398). During the eight to ten months,

se picked up numbers for all of **Yannecelle's** clients through-Westchester (399-407). Calise related how Junior Socco a lot of money gambling and disappeared leaving a good portion untended. **Yannecelle** remedies that by paying someone keep the numbers spot open (407, 408). And when William y couldn't pay a hit causing trouble when the player complained how Danny Marciano was threatened by Centrone when he dn't pay a hit (408, 409, 420). Calise also testified to own problem - gambling. How he had lost betting money and slapped by Centrone prior to being threatened with the loss both lower limbs. Calise related how he borrowed money to e up the loss and promptly quit (413-416). An attempt at itimate employment lasted 3 or 4 months (417).

Calise eager to return spoke to **Yannecelle**, who placed him the horse office. This job lasted 6 to 8 weeks. First ise assisted Jimmy Hopper (418, 425, 426). When Jimmy Hopper ame incapacitated, Calise took over the running of the horse ice. Calise duties increased to where he was also paying collecting. When he expanded his duties to pay Centrone 0.00 **Yannecelle** was angered (433, 434). When Calise's duties came too onorous he prevailed upon **Yannecelle** to hire someone take over the horse office leaving him free to attend to e collections (429, 430-432, 434). Free to make all the

collections, Calise took \$16,000 of collect money and promptly lost it at the race track (435). One Thursday Calise collected \$1,700 from Michael DeMichales at the Greene Tavern in Hastings and with \$50.00 he had in his pocket he gathered his wife and children and absconded - leaving his employee short \$17,700 and the Westchester County Court where he had a felony gambling case pending short one defendant (436, 437, 557-559). When Calise was finally arrested on a fugitive warrant, and was lingering in prison, he offered his aid to the authorities. A plea to reduce charges (misdemeanors) and fines and sentences were entered. The prosecutor agreed to forego any prosecution on the bail jumping (1090-1103).

Francis Millow, another numbers runner, was the next prosecution witness. After being questioned about whether he could identify appellant he claimed the 5th Amendment in the presence of the jury. At that time the Court excused the jury and pursued this matter with the defendant outside the presence of the jury. However, not satisfied with one refusal to answer questions on the part of Mr. Millow, the Court recalled him in the presence of the jury and questioned him about his understanding of the 5th Amendment. When Mr. Millow again refused to answer questions concerning this matter, the Court, in the presence of the jury, had Mr. Millow arrested. (565-580). (11a-25a)*

* References to pages followed by "a" are to the appendix.

Testimony continued with Detective Richard Spota. He executed a search warrant at the residence of Anthony Francis **Millow**, father and son, at 25 Cedar Street, North Tarrytown, New York, on December 31, 1974 (580, 581). Gambling records were seized in different parts of the house. While the authorities were conducting the search appellant appeared at the door to pick up some fish he had in the refrigerator (582-585).

Another search warrant was executed on November 23, 1974 at the Headless Horseman Sports Center on Beekman Avenue, North Tarrytown, New York. A search was conducted by police officer Carmen De Falco (621-623). More gambling records were seized - some from appellant's jacket, others from other persons on the premises and the remainder from the desk in the room appellant and the others were seated at when the authorities entered (624-626).

Angelina David, Peter Varriano's former girlfriend, followed. She testified to being familiar with Varriano's gambling business - having aided him in all his aspects, including accompanying him on his collections (648-650). She related how she, Varriano and appellant conducted a football pool from September 1, 1973 to the end of December 1975 when Varriano disappeared (632-633, 635, 650). It was Miss David's testimony that appellant would aid her in compiling the figures on the football operation. For the first week this was done in her apartment. However, this proved too noisy and appellant was evicted. (636-638, 641, 642). After a mistake in the point

spread in one of the football games caused Varriano to lose a great deal of money, he disappeared owing his associates, the Millows, a great deal of money (645, 650).

Special agent Douglas Wilhelmi of the FBI was the first of a host of law enforcement officials to testify to surveillance. His surveillance involved Joseph Millow driving to the Green Tavern in Hastings, New York on March 19, 1974 (701-705). Joe Millow's and Michael De Michael's activities were watched by special agent Wilhelmi again on March 27, 1974 when he observed the carrying of bags and meetings with unknown individuals (705-708). On April 29, 1974 observation of the Green Tavern found Joseph Millow arriving; Michael De Michaels leaving - a paper bag and another meeting. (708-710). On November 18, 1974 special agent Wilhelmi's observations shifted to 211 Third Avenue, North Pelham where he saw Anthony Russillo leaving and Joseph Millow entering a short while later the premises at that address. (710-711). These scenes were captured in photographs (711).

Further testimony of surveillance was interrupted to allow Theresa Belardo to testify to rental of her apartment and telephone to Michael Evangelista for \$60.00 a week (716-720). Mr. Evangelista would arrive at 10:30 A.M. and leave at 1:00 P.M. and in the evening he would arrive at 6:00 and leave at 8:00. (720). Many calls were received without Mrs. Belardo knowing

the nature of these calls (721). After two weeks Evangelista left to return at the end of 1974 (721, 723). Rental of the telephones continued for another two weeks until the FBI came to her apartment and arrested Evangelista (724).

Returning to the surveillance - on April 18, 1974 FBI special agent Joffrey Murtney observed a meeting in the vicinity of Greek Tavern between Yannecelle, Varriano and Joseph Millow (737-739). David Clarke, also a special agent of the FBI, on April 18, 1974 observed a meeting between Millow and Yannecelle in the same vicinity (721-743). In the same vicinity on April 9, 1974, special agent of the FBI Carl Amedety observed Varriano and Yannecelle leave Green's Tavern together to be followed by Joseph Millow three minutes later. (744, 745). Then on December 10, 1974 the scene changed to Bronx Boulevard and a meeting between William Murty and Michael Pissiano. James Ostander was seen being driven by Michael Evangelista in the vicinity (748, 749). Observations in this area on December 12, 1974 found Evangelista a passenger in Pissiano's automobile - Pissiano speaking to Evangelista a short while later and Evangelista slipping a white envelope to Pissiano (751, 752). On December 13, 1974 in the same vicinity Evangelista and Murty were seen in Murty's automobile (753). After they separated Evangelista walked over to Murty's automobile - later Evangelista was a passenger in John Monaco's automobile (753). Later that day on Ely and Newreed Avenue in the Bronx, Evangelista met Pissiano (754). Again on Newreed Avenue on December 16, 1974 Pissiano

entered 1838 Newreed Avenue with a key. Later that day Murty entered and left with Pissiano (755, 756). Both returned and were joined by Ostander only to leave ten minutes later (757). December 18, 1974 saw a bag pass from **Evangelista** to Murty on East 26th Street and then passed to Ostander on Baychester Avenue (757).

Special agent of the FBI Wilhelmi returned to the stand to testify to observations on December 10, 1974 at 949 East 214th Street. He found **Evangelista** pacing in the driveway. (747). And at that same address on December 13, 1974 he saw **Evangelista** and another person leaving that address and going to 239th Street where Pissiano was also observed (775-777). Then followed the return of special agent Reuter to testify to a December 19, 1974 observation of Pissiano and Ostander at East 233rd Street and Bronx Boulevard. He also testified to observing Murty, **Evangelista** and Ostander on Newreed Avenue on December 12, 1974 (793, 794). Special agent McMurney on December 16, 1974 saw **Evangelista** receive envelopes from Murty at 214th Street (798).

Dave Clark, a special agent, saw **Evangelista** leave 214th Street and Bronxwood Avenue on December 14, 1974 to meet Murty and Ostander at 1939 Newreed Avenue (799). On December 18, 1974 special agent Clark observed **Evangelista** exit 939 East 214th Street with a large bag to meet **Murty** on Bronxwood Avenue and 216th Street (800, 801). Then **Murty** went to 214th Street where he met Pissiano, gave him a bag. Monaco arrived

to join Murty and Pissiano. When Monaco left, he was replaced by Ostander who walked away with Pissiano returning with paper bags (801). A December 19, 1974 observation picked up **Evangelista** leaving 949 East 213th Street to meet Murty on Bronxwood Avenue. Murty then met Pissiano and Ostander on Webster Avenue. On December 23, 1974 a meeting was observed on Newreed Avenue between **Evangelista**, Monaco, Ostander and Pissiano involving paper bags and a trip to the weeds by **Evangelista** (802).

Gregory Albanese of the Westchester District Attorney's office then returned to the execution of search warrants; this time at 229 East 213th Street, the apartment of Theresa Belardo, where **Evangelista** was arrested attempting to rid himself of gambling records which were written on soluble paper (811-813). A search warrant was also executed at 211 Third Avenue, Pelham, New York at Anthony Russillo's residence on December 31, 1974. Gambling records were uncovered by Frank Santosola, a criminal investigator with the Westchester District Attorney's office. Harold Kaine executed yet another search warrant on December 27, 1974 on Gun Hill Road and Henning Avenue, seizing gambling paraphernalia from under the seat of William Murty's automobile. (825).

Expert testimony was supplied by R. Phillip Harker of the FBI. He examined gambling records seized pursuant to the search warrants above mentioned multiplied by six the amount of bets on them to get weekly betting and then multiplied the weekly betting by 52 to get a yearly projection of \$1,200,000 (829-836, 851-866, 868, 869, 883, 901-904). Another expert Ralph D. Brown testified to the presence of appellant's fingerprints on gambling records seized at the Headless Horseman's Sports Center (925, 933-935).

A host of law enforcement officials authenticated monitored telephone conversations, testimony of the chain of custody was supplied from various criminal investigators from the Westchester District Attorney's office and an assistant district attorney in charge of the investigation, Peter Goodrich (970-974, 978-983, 990-995, 995-1014, 1019-1026, 1040-1044, 1050-1054, 1059-1068, 1083-1089, 1108-1111, 1137, 1139, 1140, 1142, 1167, 1174, 1177, 1178). Appellant's voice was not seized on any of the taped conversations.

The trial concluded with a final visit from special agent Wilhelmi to testify to overhearing Centore telling Yannecelli in the United States Attorney's library while they were waiting arraignment - "I didn't recognize some of your partners". Appellant was not present at that time. (1193, 1194, 1217, 1218).

POINT I:

DISMISSAL OF THE CONSPIRACY CHARGE AFTER THE GOVERNMENT'S CASE MADE IMPERATIVE THE DECLARATION OF A MISTRIAL WHERE THE GREATEST PORTION OF EVIDENCE ADMITTED AT TRIAL HAD NOTHING TO DO WITH APPELLANT - ITS PREJUDICIAL EFFECTS SPILLING OVER INTO THE DELIBERATION OF APPELLANT'S GUILT OR INNOCENCE ON THE SUBSTANTIVE CHARGES.

For four months starting in September of 1973 and ending at the end of December 1973, appellant aided in the operation of a football betting pool. Then on November 23, 1974 gambling records which contained appellant's fingerprints were seized from the Headless Horseman's Sports Center with two other individuals also present during the seizure. This aside from appellant's name being mentioned in a seized telephone conversation in relation to a bank being hit was the government's evidence concerning appellant. Both direct and cross examination comprised approximately 75 pages of a 1200 page record. Appellant was required to be part of a trial which highlighted testimony of police corruption and threats to secure the efficiency of the gambling operation. Countless hours of surveillance were testified to by a **horde** of law enforcement personnel, state and federal, with only one observation of appellant at Joseph **Millow's** residence to pick up some fish he had in the refrigerator. Of the dozen or so search warrants executed appellant was only involved in one. And in the case of gambling paraphernalia and records examined by the government expert, appellant was only concerned with those seized from the Headless Horseman's Sports Center.

At a separate trial only evidence connecting appellant to the participation in a gambling operation would have been admissible. None of the testimony of 100 or so hours of surveillance or the execution of search warrants other than at the Headless Horseman or the telephone monitoring would have been admissible against appellant. Nor would the evidence of threats to Calise for losing money from the gambling operation on his private gambling, been part of appellant's prosecution. Certainly the unsubstantiated and hazy testimony of corruption of Westchester police would not have been admissible.

At best the government's theory of conspiracy based on the testimony of Michael Calise's participation in a gambling operation from 1968 into 1974 in which there was no evidence of appellant's participation - relying on the seizure of telephone conversations monitored in 1974 where again appellant's voice was not seized, was spurious. The only purpose of joining appellant and his co-defendants in a conspiracy charge was to inundate the jury with the weight of governmental activities, state and federal; spiced with violence and corruption in a mass trial.

As this Court stated in U.S. v. Aiken, 373 F. 2d 294, 299 (2d Cir., 1967):

"Where joinder was originally proper under Fed. R. Cir. N. P. (a) and (b)...a motion for severance after the count justifying joinder is dismissed will not be granted unless the defendant was prejudiced by the joinder or the count dismissed was not alleged by the government in good faith, that is, with reasonable expectation that sufficient proof would be forthcoming..."
(See also U.S. v. Branker, 395 F. 2d 881 (2d Cir. 1968).

While it may be argued that not every stretching of the conspiracy laws can be deemed bad faith on the part of the prosecution, where the stretching is of such a nature that it could not be reasonably expected that the court would allow the conspiracy charge to be deliberated upon by the jury, joinder of many defendants in such a conspiracy charge is certainly evidence of bad faith. And in looking at the remainder of the record and the volume of prejudicial testimony dealing with police corruption and threats within an organization in which appellant was not shown to be a participant, bad faith on the part of the prosecution becomes apparent. As for the second prong in the test announced in Aiken, prejudice - this "was a case where a minor participant was forced to sit through weeks of damaging evidence relating to others" (U.S. v. Miley, 513 F. 2d 1191 (2d Cir. 1975)). Touching on this point is U.S. v. Ong, F 2d (2d Cir. 1976) 1087. There this Court stated:

"Nor is it likely that the government would have been permitted to introduce the multitude of tapes concerning solely the other defendants in which they literally convict themselves out of their own mouths. These facts, when added to the prejudice inherent in any multi-defendant trial, make it impossible that [appellant's] relationship to the other defendants, by reason of his physical presence in the courtroom, injected an element of guilt by association into the jury's deliberation." (P. 5528).

However, unlike the Ong case, the failure to sever here cannot be deemed harmless error. In this case only one witness testified to appellant's participation in a gambling operation. The records seized at the Headless Horseman's Sports Center where two other persons were present and records were found in their possession did not show sufficient participation by appellant in a gambling business. Had appellant been tried at a separate trial it is likely that the result reached could have been different - acquittal. See Chapman v. California, 386 U.S. 18 (1967).

POINT III:

APPELLANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE COURT IN THE PRESENCE OF THE JURY RECALLED A WITNESS AND HAD THAT WITNESS ARRESTED AFTER HE REFUSED TO ANSWER QUESTIONS--WHEN THAT WITNESS HAD ALREADY CLAIMED THE 5TH AMENDMENT PRIVILEGE BEFORE THE JURY EARLIER IN THE PROCEEDINGS.

When Francis Millow was called he answered a few questions concerning his pedigree. When asked if he could identify appellant he claimed his 5th Amendment privilege. At that point the Court excused the jury and delved further into the reasons for Mr. Millow's claim of privilege. Outside of the hearing of the jury the prosecutor maintained that he was caught by surprise when Francis Millow claimed the 5th Amendment. And despite a warning by the Court that Mr. Millow would be held in contempt--having been given immunity---Mr. Millow persisted in his claim.

A short while later in the proceedings after the jury had been seated Mr. Millow was recalled by the prosecution. The Court in this second round of debate with Mr. Millow attempted to explain the unavailability of the 5th Amendment to him. Mr. Millow however persisted in claiming that right. Then in the presence of the jury the Court summoned United States Marshalls and had Mr. Millow arrested (20a).

Had the prosecutor or defense called a witness knowing that he would claim the 5th Amendment on the stand, such action might be deemed reversible error.

United States v. Donenech, 476 F. 2d 1229 (2d Cir. 1973).
Here the Court in essence recalled Mr. Millow and questioned him knowing that he would claim his 5th Amendment rights. This wholly inexplicable action by the Court was aggravated by the arrest of Mr. Millow in front of the jury. Coming as it did immediately after the prosecutor questioned Mr. Millow as to his identification of appellant, the proceedings that followed could only leave an impression on the jury that appellant had been the cause of Mr. Millow claiming his 5th Amendment privilege. That Mr. Millow was in such fear of appellant that he was willing to suffer incarceration rather than to give information that would implicate appellant.

POINT III

PURSUANT TO THE FEDERAL RULES OF APPELLATE PROCEDURE RULE 28(i) ALL RELEVANT ARGUMENTS RAISED IN THE BRIEFS OF THE CO-APPELLANTS ARE INCORPORATED BY REFERENCE.

CONCLUSION

APPELLANT'S CONVICTION SHOULD BE SET ASIDE.

Respectfully submitted,

IRVING KATCHER
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IRVING KATCHER and
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of Counsel

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STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is
not a party to the action, is over 18 years of age and resides at 286 Richmond
Avenue, Staten Island, N. Y. 10302. That on the 27 day of Sept.
1976 deponent served the within *BR/FF* upon
United States Attorney, Southern District of New York

attorney(s) for
Appellee

in this action, at

1 St. Andrews Pl.
New York, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing
3 copies of same enclosed in a postpaid properly addressed wrapper, in an
official depository under the exclusive care and custody of the United States
post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this 27 day
of Sept. , 1976

WILLIAM BAILEY
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

